FILE COPY

JAN 8 1935

CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

vs.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

CLAIMANT'S REPLY TO THE BRIEF FOR THE UNITED STATES.

JOHN M. PERRY,
Claimant.

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
GEORGE D. MUMFORD,
CHARLES D. PEET,
Of Counsel.

INDEX.

	PAGE
Preliminary Statement	1
I. The Meaning of the Gold Clause in the Claimant's Liberty Bond	3
II. Section Four of the Fourteenth Amendment	6
III. No provision of the Constitution authorizes Congress to enact the Joint Resolution of June 5, 1933	10
IV. The Joint Resolution of June 5, 1933 is unreasonable, arbitrary and capricious, and is a violation of the Fifth Amendment to the Constitution	12
V. The claimant, even though the Joint Resolution of June 5, 1933, is constitutional, is entitled to recover just compensation for the taking of his property for public use	17
VI. The Government's claim that the Joint Resolution impliedly withdraws its consent to be sued	20
Conclusion	21

Table of Cases Cited.

	PAGE
Campbell v. *Crampton*, 2 Fed. 415	6
Choate v. *Trapp*, 224 U. S. 665	14
Dexter & Carpenter v. *Davis*, 281 Fed. 385	14, 20
Ex parte Milligan, 4 Wall. 1	22
Horowitz v. *United States*, 267 U. S. 458	13
Legal Tender Cases, 12 Wall. 457, 110 U. S. 421	12, 13
Lynch v. *United States*, 292 U. S. 571	14, 20
National City Bank v. *United States*, 275 Fed. 885; 281 Fed. 754	14, 20
Sinking Fund Cases, 99 U. S. 700	14
United States v. *Central Pacific Ry. Co.*, 118 U. S. 235	14
United States v. *Northern Pacific R.R. Co.*, 256 U. S. 5	14
U. S. v. *Spiegel*, Federal District Court (Mass.) January 4, 1935	20
Vogelstein v. *United States*, 262 U. S. 337	14, 20

Secondary Authorities Cited.

Blackstone, Commentaries, 4th Institute, p. 36	21
Cambridge Modern History, vol. 7 (1907) pp. 631-633	9
Cornell Law Quarterly, vol. XIX, December, 1933	8, 9
Dicey, Introduction to the Study of the Law of the Constitution, 8th Ed. p. 40	21
Dunning, Political Hist. of the U. S. During Reconstruction (1880), p. 109	7

PAGE

Thorp, Constitutional History of the United States, Vol. 3 (1901) p. 297 8

Table of Statutes Cited.

Act of January 18, 1837 (5 Stat. 136) 2
Act of March 18, 1869 (16 Stat. 1) 4
Act of March 14, 1900 (31 Stat. 45) 2, 4
Act of August 5, 1909 (36 Stat. 117) 4, 5
Act of February 4, 1910 (36 Stat. 192) 5
Act of September 24, 1917 (40 Stat. 288) 5
Act of October 6, 1917 (40 Stat. 411) 14
Act of March 9, 1933 (48 Stat. 2-5) 14
Act of May 12, 1933 (48 Stat. 31) 2, 11, 15
Joint Resolution of June 5, 1933 (48 Stat. 113) 2
Act of January 30, 1934 (48 Stat. 337-340) ..... 2, 11, 12, 17 and 19
Act of June 19, 1934, 73rd Congress Public No. 419 ch. 665, sec. 3530 18

Presidential Proclamations and Executive Orders Cited.

Presidential Proclamation of January 31, 1934 2
Executive Order of March 9, 1933 ..... 14, 20

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1934.

No. 532.

JOHN M. PERRY

vs.

THE UNITED STATES.

ON CERTIFICATE FROM THE COURT OF CLAIMS.

CLAIMANT'S REPLY TO THE BRIEF FOR THE UNITED STATES.

The Government's brief in this cause has incorporated its brief in cases Nos. 471 and 472. It is not the purpose of this brief to attempt to refute in detail each and all of the arguments there set forth. Many of those arguments are either irrelevant or are contradicted by other arguments made by the Government itself. The propositions on which the Government relies to sustain its contentions in this cause consist mainly of a repetition of those set forth in its brief in cases Nos. 471 and 472 and are fully answered in the brief of the respondents in those cases. We accordingly refer to the respondents' briefs in cases Nos. 471 and 472. The intention is to clarify the issues presented herein and to answer those few arguments pertinent to this case which were not contained in the Government's brief in those cases.

Two causes of action over which the Court of Claims has jurisdiction are relied upon by the claimant to sustain his contention that the answer to each of the questions certified from the Court of Claims should be in the affirmative.

The first of these is for damages for breach of an express contract. The claimant's Liberty Bond provides for the payment of both principal and interest "in United States gold coin of the present standard of value". This "present standard of value" was first established by the Act of January 18, 1837 (5 Stat. 136) and has been reaffirmed by Congress (Act of March 14, 1900, 31 Stat. 45). The facts certified from the Court of Claims show that the United States has failed to perform this promise and this has not been denied by the Government. In its brief, the Government attempts to justify its breach of contract on the ground that performance has been excused by the Joint Resolution of June 5, 1933 (48 Stat. 113). The claimant asserts that this statute does not justify this breach of contract because, in so far as it purports to invalidate the gold clause in the claimant's Liberty Bond, it is unconstitutional and void in that it is not an exercise of any of the powers delegated to Congress and is a violation of the Fifth and Fourteenth Amendments to the Constitution.

The second cause of action relied upon by the claimant is that the Joint Resolution of June 5, 1933 (48 Stat. 113), in view of the disparity between paper currency and the gold standard established by law resulting from the refusal of the United States to redeem its currency obligations, taken together with the Act of May 12, 1933 (48 Stat. 31) as amended by the Gold Reserve Act of January 30, 1934 (48 Stat. 337, 340) and the Presidential Proclamation of January 31, 1934 reducing the standard of value at which the currency is stabilized, constitutes a taking of the claimant's property without just compensation.

Three other causes presenting issues to some extent analogous with those presented in this case have been set down for hearing at the same time. Two of these cases (Nos. 471 and 472) involve private obligations containing

gold clause provisions and do not involve, as does the instant case, the constitutionality of the attempted repudiation by the Government of its own obligations; nor do these cases involve a violation of the Fourteenth Amendment or a direct taking by the Government of property belonging to individuals. The remaining case (No. 531) is an action involving Treasury certificates, a form of currency, and no question of the power of Congress is there presented, but the issues therein are those of a denial of due process of law and of taking without just compensation. The Joint Resolution of June 5, 1933 specifically exempts currency, and its validity, therefore, is not material in case No. 531.

I.

The Meaning of the Gold Clause in the Claimant's Liberty Bond.

The claims of the parties are in direct conflict as to the meaning of the gold clause in the claimant's Liberty Bond. The claimant's position is that it must be considered a measure of the value of the obligation, while the Government purports to assert that it is merely a mode of payment. Thus, the issue upon which the claimant and the Government meet is whether or not the purpose of the gold clause provision was to protect the claimant from fluctuations in the value of currency in terms of gold or was merely a promise to pay in a particular kind of money. In other words, the Government contends, as indeed it must if its contentions are to be supported, that this provision does not serve to distinguish gold-clause from non-gold-clause obligations. The Government has attempted to establish this meaning and throughout its brief points out that no injury has been done to the claimant other than the indirect injury necessarily incident to inflationary measures, which is similarly inflicted upon the holders of obli-

gations providing in terms merely for the payment of lawful money. (See Government's brief in No. 532). Manifestly, if this major premise is false, the entire Government case falls, for no attempt has been made to defend its position if the true purpose of the insertion of the gold-clause provision was to protect the claimant from the depreciation of lawful money in terms of gold.

The claimant has shown in his brief, pages 10-16, and in fact the Government has admitted, that the "true import" of gold-clause provisions is to protect the creditor against the depreciation of currency in terms of gold (Government's Brief in Case No. 532, page 19; and in Cases Nos. 471 and 472 at page 115). In spite of this admission, the Government asserts that the gold clause in the claimant's Liberty Bond could not have been intended to have had this meaning, but that it was merely a continuation of a precedent established during the period when the monetary system of the United States was on a "dual standard", (Brief in Case No. 532, pages 8-17). An attempt is made to support this by a quotation from 45 Congressional Record, Part 2, page 1293, January 31, 1910. The Panama Canal Loan Act of August 5, 1909 (36 Stat. 117) had provided that the bonds issued thereunder should be payable "in United States gold coin", and at that time the Senate was considering a proposed amendment to the effect that "Any bonds and certificates of indebtedness of the United States issued after February 4, 1910, shall be payable, principal and interest, in United States gold coin of the standard of value on February 4, 1910; * * *". Senator Underwood, a Democrat, in response to Republican attack, said that the purpose of so providing was "because you (the Republicans) have established a precedent and we cannot get away from it". In this he was referring to the fact that the Act of March 18, 1869 (16 Stat. 1) and the Act of March 14, 1900 (31 Stat. 45), each of which inserted a gold clause in Government obligations, were enacted by Republican Congresses. The true purpose of this amendment to the Panama Canal Loan Act was stated almost immediately

afterward by Senator Payne, the proponent of the bill, appearing upon the same page of the Congressional Record as follows:

> "Now this bill provides for the payment of these bonds in gold. Why? For the benefit of the rich bondholder, according to the talk of my colleague? An adjective beginning with 'd' might properly describe that kind of talk. For the benefit of those people who buy the bonds, that they may give more money for them, and pay more money into the Treasury, and so contribute relief to the taxpayers of this country! That is the object of the bill."

The Government's contention that Congress did not realize the "true import" of the insertion of gold clauses is, of course, absurd. The Gold Standard Act of March 14, 1900 (31 Stat. 45), which finally abolished "the dual monetary system" in the United States, at the same time provided for the issue of Government obligations containing gold clause provisions; the Act of February 4, 1910 (36 Stat. 192) was enacted for the specific purpose of including such provisions in the Panama Canal Loan Act of August 5, 1909 (36 Stat. 117); and the Act of September 24, 1917 (40 Stat. 288) authorizing the issue of the claimant's Liberty Bond, similarly provided, although at that time all of the countries engaged in the World War had departed from the gold standard and the possibility that the United States would similarly be forced to abandon the gold standard was imminent.

The claimant does not, as the Government asserts (Brief in case No. 532, page 15), rely solely on the interpretation that the gold-clause provision was intended to provide for the payment of lawful money measured in terms of gold, but it relies as well upon any construction which may be reached, whether to that effect or to the effect that it is payable in a particular kind of coin or currency, as long as the clear intention of the parties is carried out. The claimant's use of the phrase "gold value" throughout

his Brief has been intended to express the clear intention that the claimant shall be protected against fluctuations of the value of lawful money in terms of gold.

II.

Section Four of the Fourteenth Amendment.

The claimant in his brief has effectively pointed out that section four of the Fourteenth Amendment protects his Liberty Bond from repudiation or payment of its face value in depreciated currency (Brief in case No. 532, pages 17-21). The Government takes the surprising position that it can repudiate any of the covenants and conditions contained in its public debt obligations, short of total repudiation, because this, as it claims, would not be questioning the *validity* of the public debt. (Brief in case No. 532, at pages 62, 65-67) This is plainly disregarding the legal meaning of the word "validity." A contract is valid when it is legally sufficient. The court in *Campbell* v. *Crampton* (2 Fed. 415), had occasion to consider the meaning of "validity", saying:

> "When the authorities which declare that the obligation, nature and validity of a contract, made in one place, which is to be performed in another, are to be determined by the law of the place of performance, are examined, it will be found that the term 'validity' refers to the conditions of the contract, and the extent and nature of its obligation, as to which the agreement will be upheld or defeated, according to the sanction or the prohibitions of the law of the place where the parties have located the transaction."

The Government further states that "the legislative history of section four likewise supports the view that the Congress intended the phrase to refer to a complete repudiation of the public debt". (Brief in case No. 532, page

62) That this statement is unfounded, and that, however meager may have been the discussion during the progress of the debate on section four of the proposed amendment, the underlying intention was to insure against scaling down of the national debt directly or indirectly by repudiating the promise to pay in gold coin, will appear from the following: On December 5, 1865, only some four months before the introduction of section four, on May 23, 1866, the following resolution was offered in the House by Samuel J. Randall and agreed to by a vote of 162 yeas, 1 nay:

> "Resolved that, as the sense of this House, the public debt created during the late rebellion was contracted upon the faith and honor of the nation; that it is sacred and *inviolate*, and must and ought to be paid, principal and interest; *that any attempt to repudiate or in any manner to impair or scale the debt* shall be universally discountenanced, and promptly rejected by Congress if proposed." (*W. A. Dunning, Political Hist. of the U. S. During Reconstruction* (1880) p. 109. Italics ours)

In the debate on the Howard amendment, on June 4, 1866 (see claimant's Brief, page 19; Government's Brief in case 532, pages 87, 88), Senator Hendricks speaking against the amendment said (Cong. Globe June 4, 1866, p. 2940):

> "The fourth section provides that the public debt shall remain inviolate. Who has asked us to change the Constitution for the benefit of the bondholders? Are they so much more meritorious than all other classes that they must be specially provided for in the Constitution? Or, indeed, do we distrust ourselves and fear that we will all become repudiators? A provision like this, I should think would excite distrust and cast a shade on public credit. But perhaps the real purpose is so to hedge in the bondholders by constitutional provision so that they never may be taxed . . . such would be the effect of this amendment. Who has attacked public credit, or questions the obligation to pay the public debt? Are the bondholders not receiving their interest, even in ad-

> vance, *and in gold?* Why do they ask this extraordinary guarantee?" (Italics ours)

Section four as amended by the Senate was passed in the House of Representatives on June 13, 1866.

Thaddeus Stevens, the protagonist of the Fourteenth Amendment, stated (Cong. Globe June 13, 1866, page 3148):

> "The fourth section, which renders *inviolable* the public debt and repudiates the rebel debt, will secure the approbation of all but traitors." (Italics ours)

The pending Fourteenth Amendment became one of the issues of the compaign for congressional elections in that year. The extraordinary procedure was adopted of holding national political conventions, usually held only in Presidential years. The subject of the *inviolability* of the national debt was specifically dealt with in several of the party platforms. (Cornell Law Quarterly, December 1933, p. 10.)

Thorp, in his *Constitutional History of the United States*, Vol. 3 (1901) p. 297, summing up public opinion, says:

> "The fourth section, on the validity of the national debt and the repudiation of the Confederate debt and of all claims for the loss of slaves, would not meet with opposition at the North. Public policy demanded the ratification of this clause.
>
> "The national debt, which at this time had reached its highest point, over two and three quarters billions of dollars, was held chiefly at the North and *its repudiation or diminution in value, or any distrust of its obligations,* would affect most disastrously the lives and fortunes of the Northern people and would injure our national credit abroad. Its *validity* was essential to our prosperity, however great the burden of payment might prove to be." (Italics ours.)

Ratification was still pending when the Presidential campaign opened in 1868. One of the chief issues of the campaign was the Fourteenth Amendment. The Democratic

platform demanded taxation of the government bonds and *their payment "in lawful money", that is, greenbacks,* (Cambridge Modern History, Vol. 7 (1907), pp. 631-633; *XIV Amendment, A Forgotten Section, Cornell Law Quar., Dec. 1933,* p. 11).

The Government points out the colloquy as to the meaning of section four, had between Mr. Johnson and Mr. Clark who offered the amendment of the Joint Committee on Reconstruction rejecting the language of section four found in the Howard Amendment, which limited it to the obligations of the United States incurred out of the Civil War. The language finally adopted is, "The validity of the public debt * * * shall not be questioned".

> "Mr. Johnson: I do not understand that this changes at all the effect of the fourth and fifth sections. The result is the same.
> Mr. Clark: The result is the same."

The fact was that the language was entirely different from that of the Howard Amendment and removed any limitation confining the debt to that incurred during the Civil War. The result is the same in that it still covers the Civil War debt, but the removal of the limitation to that debt necessarily extends protection to all other public debt.

No statement to explain or excuse a member's vote can serve to change the actual meaning of words plainly used. A resolution first proposed as deeming a thing to be "white", which resolution as actually adopted declares it to be "black", cannot by construction change the meaning to "white", because a member in debate says he votes for "black" because it means the same as, and leaves unchanged, the original declaration and meaning of the rejected "white".

In its footnote to page 67 of its Brief in case No. 532, the Government states that: "Historians who have considered section four limit its concept of public debt to that public debt existing at the time of the adoption of the Amendment", citing numerous authorities. It is submitted that the references cited do not sustain that statement.

III.

No provision of the Constitution authorizes Congress to enact the Joint Resolution of June 5, 1933.

The Government in its attempt to justify the Joint Resolution of June 5, 1933, as an exercise of the delegated powers of Congress has made no attempt to support that statute in so far as it purports to destroy gold-clause provisions intended to protect creditors from the depreciation of currency in terms of gold, but solely attempts to establish the validity of that Resolution as applied to contracts providing for payment in a particular kind of money. The Government has not shown how contracts which were intended to protect creditors from depreciation of currency in terms of gold affect or "obstruct" any of the powers of Congress. The Government seeks to show that the great number of gold-clause obligations outstanding would make it a great hardship if it were required to perform them according to their tenor, but fails to point out that the number of these obligations outstanding has been reduced from some $21,000,000,000 on May 31, 1933, to approximately $12,000,000,000 at the present time. During the same period the public debt of the United States has risen some $7,000,000,000 to an all time high of approximately $28,500,000,000 by the issue of some $16,500,000,000 of non-gold-clause obligations. Through this entire period the interest rates on new borrowing have been the lowest ever obtained by the Government. The argument that the hardship of paying its obligations according to their tenor obstructs the borrowing power and so justifies their repudiation in whole or in part is clearly unwarranted.

The Government in its attempt to justify the Joint Resolution of June 5, 1933, as an exercise of the delegated powers of Congress has gone to great lengths in an attempt to establish that emergency measures were necessary to protect the gold reserves of the country and that the establishment of a gold bullion standard was the only way to

combat the monetary policies of foreign governments. We do not here contest the right of the government to do anything necessary to protect its gold reserves or for that matter the establishment of a gold bullion standard. The Joint Resolution was not, however, a temporary measure, but was an attempt to lay the foundation for the subsequent devaluation of the currency by a destruction of vested rights, to avoid the expense necessarily incident thereto. As has been stated in the claimant's brief the Presidential Proclamations and Orders requiring gold both coin and bullion to be deposited in the Treasury and the embargo placed on foreign shipments were clearly all that was required as a temporary measure. The Joint Resolution, in so far as it applied to obligations coming due in the future, had no real or necessary relation to these emergency measures and, even if the obligations came due during the period of the emergency, the gold reserves would be amply protected if these obligations had been paid according to their tenor and the gold returned to the Treasury pursuant to the Presidential Proclamations and Executive Orders.

Even if it were conceded that the Joint Resolution was a temporary measure designed to protect the gold reserves of the country during an emergency, clearly when as now those gold reserves are greater than ever before, the emergency has ceased and the justification for the Joint Resolution must be held to have ended. The Gold Reserve Act of January 30, 1934, establishing a permanent monetary policy provides that wherever reference is made therein "to *equivalents* as between dollars or currency of the United States and gold, one dollar or one dollar face amount of any currency of the United States *equals* such a number of grains of gold, nine-tenths fine, as, at the time referred to, are contained in the standard unit of value, that is, so long as the President shall not have altered by proclamation the weight of the gold dollar under the authority of section 43, title III, of the Act approved May 12, 1933, as heretofore and by this Act amended, twenty-five and eight-tenths grains of gold, nine-tenths fine, and thereafter such a number of

grains of gold, nine tenths fine, as the President shall have fixed under such authority." (Italics ours.) In other words, Congress has recognized that the new dollar is not the equivalent of the old dollar. The claimant's bond cannot be satisfied according to its tenor by the payment of its face amount in the depreciated currency. Even adopting the Government's construction that the gold-clause provides for the payment solely of gold coin, the only claim of justification for the enactment of the Joint Resolution urged by the Government is as a temporary emergency measure. If this is true, the intent of Congress in enacting permanent monetary legislation on January 30, 1934, must have been to repeal all temporary measures and the Joint Resolution must be considered to be inapplicable in the present case.

IV.

The Joint Resolution of June 5, 1933, is unreasonable, arbitrary and capricious, and is a violation of the Fifth Amendment to the Constitution.

The Government argues that the Joint Resolution of June 5, 1933, does not violate the Fifth Amendment, but here, as in the other parts of the brief, no attempt is made to support this Resolution as a repudiation of a specific provision, inserted in the claimant's Liberty Bond, intended to protect him against the depreciation of currency in terms of gold. The Government again resorts solely to the "gold coin" interpretation of the gold clause and attempts to support its discussion under the principles established by the *Legal Tender Cases*. Far from holding that Congress could repudiate contracts payable in money, what the Court actually decided was that the particular exercise of the borrowing and coinage powers in aid of each other was not unreasonable, arbitrary and capricious because it incidently injured creditors of simple money obligations. (This Court there recognized the injury re-

sulting from payment of any obligation in depreciated currency.) This Court clearly did not decide that Congress has power to repudiate or even to lessen all obligations for the payment of money. By providing that the claimant's Liberty Bond was payable "in United States gold coin of the present standard of value", Congress attempted thereby to remove even the possibility of incidental injury resulting from the depreciation of currency. The Joint Resolution of June 5, 1933, is an attempt to remove this protection and to subject the claimant to the injury which the holders of non-gold-clause obligations would suffer through devaluation, and which would only be permitted to occur because it was indirect and incidental. The Government's argument is that, because an injury to holders of obligations without gold clauses caused in the exercise of a paramount power was held not to cause that particular legislation to violate the Fifth Amendment, Congress must also have the power directly to remove the protection it has granted and cause the holders of gold clause obligations of the United States similarly to be injured. The distinction between the existence of such a power directly to destroy a vested right and the incidental causing of an injury through the exercise of a delegated power, as was held permissible in the *Legal Tender Cases,* would seem to be obvious.

The Government relies upon *Horowitz* v. *United States,* 267 U. S. 458, as authority for the proposition that the claimant has no right of recovery in the present case. The purpose of the embargo on shipments of freight made by the United States Railroad Administration was not to repudiate its contract with Horowitz, but was to facilitate shipments of war supplies. We do not question the propriety of the holding in that case that the injury there caused was incidental and, therefore, irremediable. The admitted purpose of the Joint Resolution of June 5, 1933, was to repudiate a specific provision in Governmental obligations containing gold clause provisions which were designed to protect the creditors of the Government from

the incidental injury resulting through depreciation in the value of currency. The case of *Lynch* v. *United States,* 292 U. S. 571, is clear authority for the well established proposition that the Federal Government may not directly abrogate its contractual obligations. See also, *United States* v. *Northern Pacific RR. Co.,* 256 U. S. 5, 64; *Choate* v. *Trapp,* 224 U. S. 665, 678; *United States* v. *Central Pacific Ry. Co.,* 118 U. S. 235, 238; *Sinking Fund Cases,* 99 U. S. 700, 718, 719, 759, 760.

On page 48 of the Government's Brief in case No. 532, it is asserted that, if claimant fail to prove that gold clause obligations were at a premium in terms of the coins and currency of the United States in circulation at that time, his entire argument fails, and it continues to assert that the fact that there was in the foreign exchange market a disparity between the "old gold dollar" and the other coins and currency then in circulation in the United States, is irrelevant. It is well established, however, that the Government may not, by limiting the market, prevent the owner of property from receiving its true value. Thus, it has been held that the prices prevailing in a market which is not free are not a measure of just compensation.

> *National City Bank* v. *United States,* 275 Fed. 885, 860, aff'd. 281 Fed. 754;
> *Vogelstein* v. *United States,* 262 U. S. 337, 339;
> *Dexter & Carpenter* v. *Davis,* 281 Fed. 385.

In the *Dexter* case there was a specific holding that the mine price fixed by orders of the United States Fuel Administrator during the War was not the true measure of value.

This principle has been recognized by the United States itself within the past year. In Executive Order No. 6261 issued under the Trading with the Enemy Act of October 6, 1917, as amended by Section 2 of the Act of March 9, 1933 (48 Stat. 2-5) and signed by the President on August 29, 1933 (set forth at page 49 of the Appendix to the

brief for the Government in case No. 532), the Secretary of the Treasury was authorized to receive on consignment gold recovered from natural deposits in the United States for sale to persons licensed to acquire gold for use in the arts, industries or professions or on foreign markets. This order specifically provided that: "Such sales shall be made at a price which the Secretary shall determine to be equal to the best price obtainable in the free gold markets of the world after taking into consideration any incidental expenses, such as shipping costs and insurance." It was clearly established, therefore, that the value of gold in the United States was equivalent to the value of gold in the free markets of the world. Purchasers of gold in the United States were required to pay the world price and persons holding gold recovered from natural deposits were entitled to receive that price. We do not understand how the creditors of the United States could lawfully be placed in a less favorable position.

However, even if it were true, as it is not, that resort could not be had to the nearest free market to determine the value of the claimant's Liberty Bond, nevertheless the claimant's case does not fall because he fails to prove that there was a disparity on June 5, 1933, between the value of obligations containing gold clause provisions and those which did not. All provisions of contracts are within the protection of the Fifth Amendment which prevents their unreasonable, arbitrary or capricious destruction within the meaning of the due process clause, whether or not they may be demonstrated to have a measurable worth. A provision which may only have effect on the happening of some particular contingency, is as free from arbitrary destruction as a provision then having operative effect. (The gold clause provision in the claimant's Liberty Bond, although dormant until May 12, 1933, became of utmost importance on that date, when the possibility of the devaluation of currency, against which it was designed to protect the claimant, became imminent.)

On page 46 of its brief in this cause, the Government argues that the Court of Claims may only consider causes of action for the taking of property without just compensation, but asserts that no cause of action within the jurisdiction of the Court of Claims arises from the destruction of property. This argument is reiterated in several places in Point V of its brief, page 68 *et seq.* This has led the Government mistakenly to conclude that the Court of Claims has no jurisdiction to consider the question whether the particular statute is unconstitutional because it is unreasonable, arbitrary and capricious and is, therefore, a violation of the due process clause of the Fifth Amendment. The claimant herein has asserted two specific causes of action, each of which is within the jurisdiction of the Court of Claims under Section 145 of the Judicial Code. The first of these is for damages for breach of contract. There is no doubt that the Government has refused to redeem the claimant's Liberty Bond according to its tenor, and in this action has set up the Joint Resolution of June 5, 1933, as a justification for its refusal. The claimant has asserted that this statute is unconstitutional and void and is, therefore, a nullity. One of the specific grounds that the claimant has relied on is that this Joint Resolution is a violation of the due process clause of the Fifth Amendment. The claimant does not, as the Government asserts, attempt to maintain an action against the United States on the ground that his property has been destroyed. His action is for breach of contract.

V.

The claimant, even though the Joint Resolution of June 5, 1933, is constitutional, is entitled to recover just compensation for the taking of his property for public use.

The Government in its brief argues that there has been no taking of the claimant's property and therefore claims that he is entitled to no compensation. The cases which are cited to support this proposition are those which concern incidental destruction of property but do not involve the direct repudiation of a contract entered into by the United States. A contract between the Government and a private person can no more effectively be taken than by its direct repudiation and refusal to perform in accordance with its terms (Brief, page 42). It is well established, when the Government takes private property for public use, that just compensation must be paid. This clearly would be applicable if the Government sought to take gold possessed by individuals without remuneration or without paying its true worth. How a distinction can be made between different kinds of property is difficult to understand and the claimant's contract calling for satisfaction "in United States gold coin of the present standard of value" is as sacred a property right as would be the ownership of gold coin.

Congress itself by the Gold Reserve Act of January 30, 1934, stated that after devaluation the value of such property would be increased in terms of money. Thus in Section 7, it is provided that, "In the event that the weight of the gold dollar shall at any time be reduced, the resulting increase in value of the gold held by the United States (including the gold held as security for gold certificates and as a Reserve for any United States notes and for Treasury notes of 1890) shall be covered into the Treasury as a miscellaneous receipt; * * * ". Section 10(b) appropriates out of such profits the sum of $2,000,000,000 for deposit with the Secretary of the Treasury for use as a stabilization

fund. This profit accrued to the Government from its taking of gold and has been officially estimated at $2,800,000,000 by Secretary Morganthau, in his radio address on August 28, 1934, (See The New York Times August 29, 1934, page 29) as follows:

> "But we have another cash drawer in the Treasury in addition to the drawer which carries our working balance. This second drawer I will call the gold drawer. In it is the very large sum of $2,800,000,000 representing 'profits' resulting from the change in the gold content of the dollar. Practically all of this 'profit' the Treasury holds in the form of gold and silver. The rest is in other assets."

This is, of course, the only profit shown on the books of the Treasury, while the attempted reduction of the public debt by the Joint Resolution of June 5, 1933, made effective by the Proclamation of January 31, 1934, amounts to over $14,700,000,000. (The amount of additional legal tender currency required to satisfy the outstanding gold clause obligations of the Government at the present time would be approximately $8,000,000,000.)

Congress has further indicated the inequity of its retention of such a profit by providing that the Philippine Government, which had maintained the major portion of the currency reserve of its monetary system in banks of this country, should be given credit for the increase in the value of this gold on the books of the Treasury and by this action recognized that it would be inequitable to retain the difference in value between the deposits made by that Government and the face amount in devalued currency, (Act of June 19, 1934, Seventy-third Congress, Public No. 419, c. 655, sec. 3530). The Philippine Government had received in return for its deposits the promise of the Government of the United States that they would be repaid. The Federal Government has specifically promised to pay the claimant a sum of money and to protect him against the devaluation of the currency. How the promise of the United States to the Philippine

Government may be considered to be more sacred than the promise of the United States to one of its citizens who is protected by the Constitution is difficult to comprehend.

Nor would the fact that claimant might be unable to show that there was a disparity on June 5, 1933, between gold-clause and non-gold-clause obligations prevent his recovery of just compensation for the taking of his property, as is apparently claimed by the Government (Brief in case No. 532, page 70). It will be noted that on June 5, 1933, and at all times until January 30, 1934, it was within the power of the Government of the United States to pay the claimant's Liberty Bond according to its tenor in either 10,000 gold dollars each containing 25.8 grains of gold .9 fine, or in an amount of legal tender currency measured thereby. The Joint Resolution, while providing that gold-clause obligations might be satisfied by the payment of legal tender currency, did not declare that these obligations must be paid in such currency. Therefore, until January 30, 1934, when the Gold Reserve Act was adopted there was no definite possibility that the United States would break or would attempt to break its contract by failing to pay in accordance with its literal terms. That statute provided that "No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States; * * *". By this provision, therefore, the possibility that literal compliance with the obligation of the claimant's bond would not be made became imminent. That date, therefore, would be the earliest upon which the claimant would be entitled to assert a taking of his property. The claimant's bond on that date had not, however, matured and it is believed that after April 15, 1934, the date fixed for redemption, and on May 24, 1934, when the Government actually refused to pay the true value of its obligation, is the date upon which the claimant's right to just compensation should be measured.

Even if the date of the taking of the claimant's property is to be considered as June 5, 1933, it is clear that the "just compensation" to which the claimant is entitled is

a judicial question and that the value of his property (i. e. the gold or gold coin to which he is entitled) can only be determined in the nearest free market. See pages 14-15, *supra* and *National City Bank* v. *United States,* 275 Fed. 885, 860 aff'd. 281 Fed. 754; *Vogelstein* v. *United States,* 262 U. S. 337, 339; *Dexter & Carpenter* v. *Davis,* 281 Fed. 385.

The Federal Government itself has conceded that the currency dollar, redemption of which was suspended in March, 1933, was of less real worth than the gold dollar containing 25.8 grains of gold .9 fine, by permitting the owners of gold from natural deposits in this country to sell and requiring purchasers of gold for use in the arts, industries or professions to pay, the world price in terms of currency dollars. (Executive Order No. 6261, August 29, 1933.) This was even before the order of the Secretary of the Treasury requiring the delivery of gold coin to the Treasury Department which was issued December 28, 1933, which was the first order properly issued. Even under this order it has been held that the Federal Government has no right to require the delivery of gold without payment of just compensation. (Opinion of Judge Brewster, *U. S.* v. *Spiegel,* Federal District Court, Mass., reported in *The New York Times,* Saturday, January 5, 1935, at page 25, column 8.

VI.

The Government's claim that the Joint Resolution impliedly withdraws its consent to be sued.

This claim (Brief in case No. 532, pp. 80-83) is clearly untenable, the Government's position being that the Joint Resolution, by implication at least, withdraws the consent to be sued by impliedly forbidding suit on gold clauses because they are not recognized as matter of public policy. The Government asserts that *Lynch* v. *United States* (292

U. S. 571, 582, 585-587), declares "that a mere withdrawal of the consent to sue on a contract would not imply repudiation". However, the Joint Resolution did not purport to deal with procedural matters and is sought to be justified as an exercise of the currency power. The *Lynch* case is a ruling to the contrary of the Government's claim, for that case decides that a provision directly worded to abrogate a governmental contract will not, in the absence of words showing the intent to withdraw the consent, be construed to be a repeal of the consent to be sued. As in the case at bar, the Statute aimed at the "right" and not at the "remedy". (See 292 U. S. 571, at 585-587)

CONCLUSION.

The claimant has shown that if the Joint Resolution of June 5, 1933, is sustained, it must be on the theory that Congress has the power to regulate and fix the value of all property, not indirectly through the increase or decrease in the value of currency, but by direct legislation. If this theory is established, the Congress, like the Parliament of Great Britain, will be held to be endowed with unlimited legislative authority. Blackstone has stated that the British Parliament has power "to do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament". (*Commentaries,* 4th Institute, page 36, quoted by Dicey, *Introduction to the Study of the Law of the Constitution,* 8th Ed. p. 40.) It may be that our constitution should have conferred the same omnipotence on the Congress, but this was not done. The Government's contention is that in an emergency, the authority of Congress becomes unlimited to deal with economic affairs through an extension of the currency power. (Brief in case No. 532, pages 17-45.) This Court answered

this argument seventy years ago when it stated in *Ex parte Milligan* (4 Wall. 1, 120, 121), that the framers of the Constitution

> "foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence."

The claimant submits that both questions certified to this Court by the Court of Claims should be answered in the affirmative.

Respectfully submitted,

JOHN M. PERRY,
Claimant.

Of Counsel:

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
GEORGE D. MUMFORD,
CHARLES D. PEET.

16

FILE COPY

Office Supreme Court, U. S.
FILED
JAN 11 1935
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 532

JOHN M. PERRY

vs.

UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

COPY OF DOCUMENT READ BY CLAIMANT ON ORAL ARGUMENT IN SUPPORT OF STATEMENT FOUND AT PAGE 18 OF CLAIMANT'S REPLY BRIEF.

JOHN M. PERRY,
Claimant.

JOHN M. PERRY,
HERSEY EGGINTON,
LOUIS B. WARREN,
GEORGE D. MUMFORD,
CHARLES D. PEET,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 532

JOHN M. PERRY

vs.

UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

COPY OF DOCUMENT READ BY CLAIMANT ON ORAL ARGUMENT IN SUPPORT OF STATEMENT FOUND AT PAGE 18 OF CLAIMANT'S REPLY BRIEF.

Secretary Morganthau's Radio Address on New Deal Cost and Finances, *N. Y. Times, Aug. 29, 1934,* page 1, column 8, page 29, columns 7-8 (Text at page 29, columns 2-6)

(New York Times August 29, 1934, page 1, columns 7-8)

"Treasury to use profit of $2,800,000,000 on Gold in balancing the budget

Morganthau Tells Plan

Money will be locked in Stabilization Fund till Time to Cut Debt.